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In The

# Supreme Court of the United States

October Term, 1998

UNITED STATES OF AMERICA,

*Petitioner,*

AND

JOHN HUMENANSKY,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENT

### THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOES NOT ABROGATE THE STATES' SOVEREIGN IMMUNITY

The court of appeals properly concluded that the Eleventh Amendment bars federal court jurisdiction over unconsenting states in private actions under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* The court held that the ADEA does not satisfy either prong of the stringent two-part test for abrogation reiterated by this Court in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). First, the ADEA does not "unequivocally express[ ]" Congressional intent to abrogate the States' immunity; and second, the statute was not passed "pursuant to a valid exercise of power," specifically, Section 5 of the Fourteenth Amendment. Petitioner's App. 2a-13a; *see Seminole Tribe*, 517 U.S. at 55, 116 S. Ct. at 1123 (citations and internal quotations omitted). The court of appeals' decision fully accords with Supreme Court precedent.

That the ADEA does not explicitly abrogate States' sovereign immunity follows directly from this Court's decision in *Employees of the Department of Public Health & Welfare v. Missouri*, 411 U.S. 279, 93 S. Ct. 1614 (1973). In *Employees*, this Court held that the Fair Labor Standards Act (FLSA), as then written, was insufficient to express a Congressional intent to abrogate. *Id.* at 285, 93 S. Ct. at 1618. Congress in 1966 had amended the FLSA to include States as "employers," but had left untouched the jurisdictional provision – 29 U.S.C. § 216(b) – that simply authorized suit in "any court of competent jurisdiction." This Court reasoned that it would be "surprising . . . to infer" that Congress deprived the States of their constitutional immunity without changing the jurisdictional provision. *Id.* at 285, 93 S. Ct. at 1618.

The ADEA's provisions are virtually identical to the FLSA provisions found insufficient in *Employees*, with a

definition of "employer" that includes States, 29 U.S.C. § 630(b)(1), and a jurisdictional provision that authorizes suit in "any court of competent jurisdiction." *Id.* at § 626(c)(1). The case for abrogation under the ADEA is even weaker given that Congress chose not to amend the ADEA's jurisdictional provision precisely when amended the FLSA's jurisdictional provision in response to *Employees*. *See* Petitioner's App. 4a-5a. The court of appeals reasoned that there could be only two rational explanations for Congress's action: "no intent to abrogate for the ADEA, or legislative oversight, which is not a proper basis for finding 'unmistakably clear' intent to abrogate in the statute's text." *Id.* at 6a (citation omitted).

The court of appeals appropriately rejected the argument that Congress expressed a clear intent to abrogate by incorporation into the ADEA of the "powers, remedies, and procedures" provided in section 216(b) of the FLSA. *See* 29 U.S.C. § 626(b). Section 626(b) does not state that the FLSA's jurisdictional provision is incorporated into the ADEA. Moreover, section 626(b) refers not just to section 216(b), but also to section 626(c), the ADEA's jurisdictional provision, suggesting that Congress intended ADEA jurisdiction to be governed by section 626(c), not the FLSA. In addition, it is not unmistakably clear that the incorporated "powers, remedies, and procedures" from the FLSA refer to federal court jurisdiction, rather than to such things as the right to bring a lawsuit, the right to a jury trial, the right to equitable and legal relief, and other nonjurisdictional provisions. While one might infer that Congress intended the FLSA jurisdictional provision to control under the ADEA, that inference is not the most reasonable one given the statutory language; in any event, a mere inference does not meet the standard of certainty required by this Court. *Dellmuth v. Muth*, 491 U.S. 223, 232, 109 S. Ct. 2397, 2402 (1989).

Even with incorporation of part of the FLSA, Congress could have made its intent clear by directly

addressing immunity within the ADEA itself. Comparison with the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, is instructive. Just as the ADEA incorporates the "powers, remedies, and procedures" of the FLSA, the ADA incorporates the "powers, remedies, and procedures" of Title VII. *See* 42 U.S.C. § 12117(a). At the time the ADA was enacted in 1990, the Supreme Court already had held that Title VII abrogates Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671 (1976). If mere incorporation of a "powers, remedies, and procedures" provision was sufficient to abrogate immunity, Congress would not have abrogated immunity within the ADA itself. Congress, however, did expressly abrogate Eleventh Amendment immunity within the text of the ADA. 42 U.S.C. § 12202. Congress's failure to do the same thing in the ADEA suggests that it did not intend to abrogate States' immunity.

The court of appeals also appropriately held that Congress lacked authority under Section 5 of the Fourteenth Amendment to extend the ADEA to the States, regardless of whether the abrogation of immunity was explicit. In *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), this Court emphasized that Congress does not have the authority under Section 5 to determine the substance of the Fourteenth Amendment's rights; rather, Congress's power is limited to enforcing those rights as defined by the courts. 117 S. Ct. at 2164. While Congress can act under Section 5 to redress or deter unconstitutional discrimination under the Equal Protection Clause, Congress cannot decide that "rational" (*i.e.*, constitutional) state action is in fact "arbitrary" or "invidious" (*i.e.*, unconstitutional) discrimination.

This Court has held that age-based classifications are subject to the most deferential review under the Equal Protection Clause. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567 (1976). Applying the rational-basis standard, this Court repeatedly has

upheld mandatory retirement laws, which in essence use age as a proxy for ability in a job, as rational and therefore constitutional under the Equal Protection Clause. *Id.* at 314-16, 96 S. Ct. at 2567-68; *Vance v. Bradley*, 440 U.S. 93, 112, 99 S. Ct. 939, 950 (1979); *Gregory v. Ashcroft*, 501 U.S. 452, 473, 111 S. Ct. 2395, 2408 (1991). This Court has ruled that the Constitution does not require employers to use individualized testing to determine ability, nor does it require states to justify their decision to use age instead. *Murgia*, 427 U.S. at 316, 96 S. Ct. at 2568. Even if an age-based system is "imperfect" and not "wise," and even if the state could devise a " 'more just and humane system,' " such a system still is constitutional under the Equal Protection Clause. *Id.* at 316-17, 96 S. Ct. at 2568-69 (citations omitted). Thus, while Congress can act under the Commerce Clause to eliminate age-based employment classifications it considers unsound, unjustified, or economically unwise, *see E.E.O.C. v. Wyoming*, 460 U.S. 226, 243, 103 S. Ct. 1054, 1064 (1983), Congress cannot declare those classifications unconstitutional under the Equal Protection Clause.

The ADEA encompasses within its scope exactly the type of constitutional age-based classifications at issue in *Murgia*, *Vance*, and *Gregory*. The ADEA does not redress irrational discrimination; rather, it changes the standard for determining what is rational. Moreover, the ADEA does not deter more broadly arbitrary age discrimination; rather, it prohibits constitutional conduct regardless of whether that conduct ultimately leads to irrational, unconstitutional discrimination. The same kind of flaws in the Religious Freedom Restoration Act led to this Court's decision invalidating the statute in *City of Boerne*. *See* 117 S. Ct. at 2171 (observing that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise"). The court of appeals correctly concluded that Congress lacked authority to abrogate the States' immunity under the ADEA.

## CONCLUSION

Given the similarity of questions presented here and those presented in cases in which this Court has granted review, *see United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791, Respondent does not disagree with Petitioner's suggestion that this Court hold the petition in this case until those cases are decided. For the reasons articulated by the court of appeals and those highlighted in this brief in opposition, however, Respondent respectfully urges the Court to uphold the decision that the ADEA does not abrogate the States' sovereign immunity.

Respectfully submitted.

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